

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

*PL-2*  
*Weiskopf*  
*120114*

**FILE:** B-207888.4, .5, .6, .7 **DATE:** December 13, 1982

**MATTER OF:** Space Services International Corporation

**DIGEST:**

1. Bidder's complaint that it only received an amendment 2 or 2-1/2 days before bid opening and therefore did not have adequate time to consider it in preparing the bid does not affect the validity of the award. The agency issued the amendment in sufficient time to permit bidders to consider it in bid preparation, and the propriety of the procurement therefore depends on whether the Government obtained adequate competition and reasonable prices, not on whether some prospective bidders in fact failed to receive the amendment in time to consider it.
2. An IFB's estimated quantities of mess services to be procured under a requirements contract need not be absolutely correct, but must be a reasonably accurate representation of anticipated needs to form a basis for intelligent competition. GAO normally will not sustain a challenge to the estimates unless the protester shows they misrepresent anticipated actual requirements, are not based on the best information available, or resulted from fraud or bad faith.
3. The fact that an IFB for an agency's mess services requirements in several buildings bases payments on unit prices for each day of service in a particular building is not objectionable even though periodic closings of some buildings could affect the number of meals served in others, and thus affect the contractor's costs. The IFB advises bidders of periodic closures, and while they may present a certain level of risk to the contractor, bidders should factor that into their bid prices.

4. A protest that estimated quantities for a requirements contract permit unbalanced bidding raises a question of whether the estimates are sufficiently accurate to permit a reasonable determination that the low bid actually will represent the lowest cost to the Government. Protest lacks merit where the estimates are sufficiently accurate to permit such a determination.
5. A firm fixed price contract is one that is not subject to adjustment because of the contractor's cost experience during performance. Thus, where an IFB for a requirements contract to provide mess services requires a fixed price for the basis for payment, it does not violate the mandate for a firm fixed price contract after formal advertising merely because the number of meals required, estimated in the IFB, is indefinite.
6. Where the IFB states the contract period for a requirements contract will begin "on September 1, 1982, or the date of award, if later," and extend through August 31, 1983, the bidder has the responsibility to consider any risks of a reasonably delayed award in computing its prices. Moreover, after the expiration of the required 30-day bid acceptance period, the bidder need not extend its bid if it feels the delay adversely affects its prices.
7. Although Defense Acquisition Circular 76-36 amends the Defense Acquisition Regulation to prohibit the agency's evaluation of prompt payment discounts in determining the low bidder, by its terms the amendment is effective upon receipt by the contracting activity, and therefore the agency could not disregard offered discounts where the amendment was received after bid opening under an IFB permitting their evaluation.

This decision is in response to four protests filed by different firms under Army invitation for bids (IFB) No. DABT 47-82-B-0107. The invitation sought bids to provide mess attendant services at Fort Jackson, South Carolina from September 1, 1982, or the date of award, through August 31, 1983. Three firms--Space Services International Corporation, Food Services, Inc. and Edwards Enterprises, Inc.--protest that the Army did not inform bidders reasonably in advance of bid opening that it was making certain background material available for inspection by potential bidders. In addition, Space Services and Food Services complain that the IFB's estimates failed to provide an adequate basis for competition. Space Services also complains that the IFB does not provide for a firm fixed price contract. The fourth protester, HLJ Management Group, objects to the Army's evaluation of prompt payment discounts to determine the bidder in line for award. We find these, as well as certain other protest grounds to lack merit.

#### I. BACKGROUND

The IFB listed several dining facilities and provided separate estimates of the number of weekdays each facility would be open, the number of weekend days and holidays each would be open, and the daily number of meals to be served in each facility (including a breakdown for breakfast, lunch and dinner). The IFB also provided peak estimates of the number of meals that might be required on any day during the expected surge period, September through February. The bidder was instructed to offer two unit prices for each facility--a daily price for a weekday and a daily price for a weekend day--and extended prices representing the product of the unit price multiplied by the estimated number of days the facility would be open.

The IFB explained that a single award would be made to the responsible bidder offering the lowest aggregate price, including consideration of any prompt payments discount offered. Under the IFB, the unit rates would provide the basis for contract payments, unless the monthly aggregate of meals served in all the dining facilities varied by more than 15 percent of the estimates for all the facilities, in which case either party could demand an equitable adjustment.

Prior to bid opening, some bidders insisted that they needed historical data showing the actual number of meals served, days and hours open, and days closed per facility--including the reason for closing the facility. In fact, Space Services and the incumbent contractor, Springfield Services, Inc., filed protests with this Office complaining that the Army had failed to disclose this data. The Army responded by issuing an amendment dated August 11, 1982, which included several changes to the IFB and a notice to potential bidders that the historical data showing the number of meals served daily in each building, which formed the basis for the Government estimate, was available for review in the Procurement Office. This action prompted Springfield Services to withdraw its protest.

The Army has delayed making an award until our resolution of the protests.

## II. ISSUES

Space Services, Food Services and Edwards Enterprises all allege that they did not receive the amendment permitting examination of the historical data until 2 or 2-1/2 days before bid opening, which occurred on August 20, and that they lacked sufficient time to consider the amendment's details or the historical data in computing their bids. (We discuss this issue under part A of heading III, ANALYSIS.)

Space Services and Food Services also contend, apparently based on their review of the historical data, that the IFB's estimates did not reflect the actual use of the Army's dining facilities (discussed in part B(1)). According to these protesters, the Army historically has closed some buildings on weekends and "consolidated" the closed facilities' meal requirements with those of other buildings. Food Services alleges in this regard that the Army consolidates two pairs of the buildings listed in the IFB on a biweekly basis.

Both protesters agree that future consolidations will cost the contractor money under the IFB. Food Services alleges that consolidations drastically increase the meal counts in a manner not reflected in the IFB, and suggests that providing mess services in a consolidated facility is more costly than providing such services in separate facilities. Space Services complains that there was no IFB provision dictating that a different rate should apply

when buildings are consolidated. Therefore, if the Army closes a building priced at a higher rate and consolidates it with a facility priced at a lower rate, the contractor loses the benefit of the higher rate. In this regard, Space Services also argues that the clause permitting equitable adjustments based on variations in the monthly total number of meals served in all the facilities (as opposed to variations in any given building) was unfair to bidders since it would allow the Army to consolidate buildings without making any adjustment in the contractor's payments.

In addition, Space Services alleges that the failure to solicit separate prices for consolidations encouraged unbalanced bidding, since the estimates allegedly do not accurately reflect the actual use of the facilities, and because the actual number of meals served in consolidated facilities allegedly will significantly exceed the estimates. According to the protester, the bid evaluated as low may actually represent a higher cost to the Government than other bids. (We address this issue in part B(2).)

The protesters also raise four other grounds of protest as follows:

--Space Services complains that the IFB does not provide for a firm fixed price contract, in violation of procurement regulations (discussed in part C);

--Food Services alleges the IFB was ambiguous as to how often range hoods must be cleaned (discussed in part D);

--Space Services complains bidders are prejudiced because the contract period will not be one year, as originally contemplated, due to the agency's withholding award pending our decision (discussed in part E); and

--HLJ Management Group objects to the Army's consideration of bidders' offered prompt payment discounts in evaluating bids (discussed in part F).

### III. ANALYSIS

#### A. Allegedly insufficient period to examine historical data.

The advanced date on which certain firms received the amendment announcing the historical data's availability for examination does not provide a basis for our objecting to any award under the circumstances of this case. The Army issued the amendment 9 days before bid opening. Although the date the Army dispatched the amendment is unspecified, only Space Services, Food Services, and Edwards Enterprises responded that they lacked sufficient time to prepare their bids. The Army received 25 bids from firms throughout the continental United States (all the protesters except Food Services submitted bids), and determined nineteen of these bids to be responsive. The Army also concluded that the low bid offered a reasonable price--a conclusion uncontested by any protester.

Defense Acquisition Regulation (DAR) § 2-208 (1976 ed.) basically requires that prospective bidders be given sufficient time to consider amendments containing information which would benefit any bidder. We consistently have held that the contracting activity discharges its responsibility when it issues and dispatches an amendment in sufficient time to permit all the prospective bidders to consider the information in preparing their bids, notwithstanding the fortuitous delay or loss of a particular bidder's copy of the amendment. See 52 Comp. Gen. 281 (1972). The propriety of a particular procurement generally does not depend on whether some prospective bidders in fact fail to receive an amendment in sufficient time to consider it in preparing their bids but on whether the Government obtained adequate competition and reasonable prices. See Culligan Incorporated, Cincinnati, Ohio, 56 Comp. Gen. 1011 (1977), 77-2 CPD 242.

Since bids were received without objection from bidders located as far from South Carolina as the states of Washington and California (the protesters are located in Georgia, North Carolina and Texas), it is evident that the amendment was mailed in sufficient time to permit bidders to consider the amendment and to act on it. Considering that no protester alleges that the Army deliberately attempted to preclude it from bidding, and that the Army obtained adequate competition and reasonable prices, three potential bidders' failure to receive the amendment in time to consider it in computing their bids does not provide a basis for our objecting to an award. See E&I, Inc., B-195445, October 29, 1979, 79-2 CPD 305.

B. Allegedly Inadequate Estimates

(1) Space Services and Food Services (hereafter the protesters) basically complain that the estimates do not accurately reflect the agency's alleged practice of consolidating certain dining facilities.

When an agency solicits bids for a requirements contract on the basis of estimated quantities, as here, the agency must base its estimates on the best information available. There is no requirement, however, that the estimate be absolutely correct; the estimated quantities simply must be a reasonably accurate representation of anticipated actual needs. Technology/Scientific Services, Inc., B-198252, November 28, 1980, 80-2 CPD 397. Since the protester bears the burden of proof, we normally will not sustain a challenge to an agency's estimates unless it is shown that the estimates misrepresent anticipated actual requirements, are not based on the best information available, or resulted from bad faith or fraud. See JETS Services, Inc., B-190855, March 31, 1978, 78-1 CPD 259.

The protesters' complaints lack merit under these standards. The protesters do not allege that the estimated quantities were not based on the best information available or were the result of fraud or bad faith. Also, for the reasons stated below, we believe the protesters have failed to show that the IFB did not provide a reasonably accurate representation of the Army's anticipated actual needs.

The IFB included the following statement regarding the estimates for the four buildings which allegedly are consolidated routinely:

"The dining facility normally will be closed one weekend per month after serving the lunch meal on Friday and will reopen for the breakfast meal on Monday \* \* \*."

The IFB also expressly reserved the Government's right to consolidate dining facilities, and provided that in the event of consolidation the contractor will be paid the prices stated in the bid schedule for the open facility if the dining facilities are comparable.

Thus, the IFB did inform bidders of periodic closings and consolidations, and of the basis for payment in those events. Moreover, while it was not apparent from the IFB or the historical data which facilities, if any, served meals in place of the closed facilities, our examination of the historical data fails to reveal a pattern of dramatic departures from the estimated quantities for any buildings as a result of another building's closure. Since Fort Jackson is a training facility with frequent fluctuations in the number of trainees, it appears that facilities often were closed without creating unusual demands on any other buildings, because of the low number of attending trainees.

We therefore believe the Government's estimates provided a reasonably accurate representation of the Government's anticipated needs. As stated previously, there is no requirement that the estimates be absolutely correct, but they must provide a reasonable basis for intelligent competition. See Technology/Scientific Services, Inc., supra.

To the extent that the protesters object to the method for payment in the event of consolidations, no protester alleges that the Army has manipulated consolidations to effect lower costs to the Government instead of consolidating facilities as needed. The fact that the solicitation's provision for payment (at the rate of the open facility and for equitable adjustments for fluctuations in the total number of meals served in all the facilities) may not reflect the contractor's true costs of servicing consolidated facilities is not in itself objectionable. While it is clear that consolidations could present a certain level of risk to bidders, some risk is inherent in most types of contract and bidders are expected to allow for that risk in computing their bids. See Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116. The method of payment contemplates that bidders will take into account the possibility of consolidations in computing their unit prices for the facilities. No bidder has an advantage over any other, and we are aware of no regulation or statute which prohibits this situation.

Moreover, as a practical matter, it would have been difficult for the agency to solicit prices for every conceivable consolidation which future events might necessitate since not all such consolidations are reasonably foreseeable. We believe the selected methodology, in conjunction with the availability of



historical data, does not require the bidder to incur any greater risk than the bidder would incur by pricing consolidations and having to guess at the frequency with which some might occur.

(2) Space Services also complains that the estimates are inaccurate regarding consolidations and thus encourage unbalanced bidding. The protester contends that since the IFB bases payments for consolidations on the price offered for the open building, bidders who underprice the buildings they expect to be closed on weekends and overprice the buildings they expect will accommodate people from the closed facility will be evaluated at an artificially low amount.

The entire argument hinges on the assumption that closures and consolidations will result in increases over the estimated quantities for the higher priced buildings. Thus, the basic issue is whether the Government's estimates were sufficiently accurate to permit a determination that the low bid actually will represent the lowest cost to the Government. See TWI Incorporated, 61 Comp. Gen. 99, 103 (1981), 81-2 CPD 424.

We previously noted that the historical data did not indicate a pattern of dramatic departures from the estimated quantities for any buildings as a result of another building's closure. The protester, who had access to historical data, has not submitted any evidence showing that such a pattern reasonably could be anticipated. Moreover, the protester did not allege after bid opening that any bid was unbalanced. Therefore, adhering to our position that the estimated quantities reasonably represented the Government's anticipated needs and provided a reasonable basis for intelligent competition, we have no basis to conclude the IFB's estimates preclude a reasonable determination that an award to the lowest bidder will result in the lowest cost to the Government.

#### C. Type of Contract

Space Services suggests that since the ultimate total cost to the Government is uncertain, the invitation violates the general requirement, contained in DAR § 2-104, for a firm fixed price contract after formal advertising. The uncertainty arises from the fact that, although the prices for the services listed in the IFB are fixed for each day's services in an open building, closures and consolidations will affect the ultimate cost to the Government.

A firm fixed price contract, however, simply is one that is not subject to any adjustment by reason of the cost experience of the contractor during performance. DAR § 3-404.2(a). Thus, the mere fact this is an indefinite quantity requirements contract does not mean that it is not a firm fixed price contract under DAR § 2-104. For purposes of DAR § 2-104, the total contract price does not necessarily have to be fixed, if the unit price is fixed and payment is to be made on the basis of the services actually rendered. Cf. Palmetto Enterprises, supra (where a similar type of contract was involved). Indeed, DAR § 3-409(c) expressly recognizes firm fixed price contracts of this sort. Thus, even though the total number of days any building in fact will be open is indefinite and will depend on the Army's actual needs, the IFB in this case envisioned a fixed price contract within the meaning of the regulations since it required a fixed daily price for each open building and payment on that basis.

#### D. Allegedly Ambiguous Specification

Food Services alleges the IFB was ambiguous--that is, susceptible to more than one reasonable interpretation--concerning the required frequency of cleaning range hoods. The IFB provided the contractor must:

"Wash and clean all ventilating hoods throughout facility on the exterior daily and both interior and exterior shall be washed and cleaned weekly."

Food Services contends this language is unclear as to whether range hoods should be cleaned on a daily or weekly basis. We disagree.

The quoted provision has only one reasonable interpretation. The first part of the provision regarding hood exteriors clearly required cleanings on a daily basis. The second part additionally required that both exteriors and interiors must be cleaned on a weekly basis. Thus, the first part subsumed, but did not conflict with, the second part's requirement that interiors be cleaned on a weekly basis with exteriors. Although both parts repeat the requirement for cleaning exteriors, the provision as a whole is not susceptible to more than one reasonable interpretation, namely, that exteriors be cleaned daily and interiors weekly.

Since the clause was not subject to more than one reasonable interpretation, it was not ambiguous. See Conrac Corporation, B-205562, April 5, 1982, 82-1 CPD 309.

E. Alleged Prejudice from Reduction of the Contract Period

Space Services alleges it is prejudiced by the reduction of the contract period resulting from the delayed award, since it based its overhead factor on a 1-year contract period and will not have a year to recover its full overhead if awarded the contract. The basis for protest lacks any merit.

The IFB specifically advised bidders that performance would commence "on September 1, 1982, or the date of award, if later." Therefore, bidders, including the protester, had the responsibility of considering the risks of reasonable delays in computing their prices. See Tennessee Valley Service Company, 57 Comp. Gen. 125 (1977), 77-2 CPD 442. Moreover, if the protester did not want to be bound to its prices, it could have refused to extend its bid after the required 30-day acceptance period had expired.

F. Propriety of Evaluating Prompt Payment Discounts

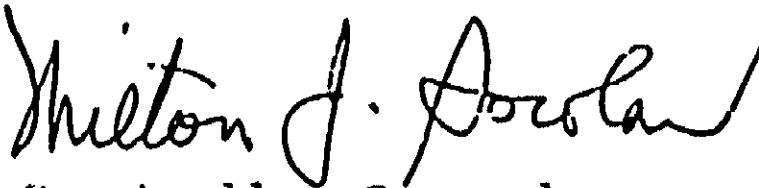
HLJ Management Group contends that the Army's consideration of offered prompt payment discounts to determine the low bidder violated a recent amendment to the DAR prohibiting the evaluation of such discounts. DAR § 2-407.3 had permitted bidders to offer a discount for contract payments made promptly after they were due. The bidder specified, within certain limitations, the duration of the period during which the Government could make payment and deduct the discount. Defense Acquisition Circular No. 76-36, June 30, 1982, amended DAR § 2-407.3 to prohibit the consideration of prompt payment discounts to evaluate bids. Based on this change, HLJ contends the Army should make award to it since it would be the low bidder if discounts were not evaluated.

The Army reports that the contracting activity issued the IFB with a clause permitting the evaluation of prompt payment discounts because it did not receive the Circular until after bid opening. The Army argues that since the IFB permitted the evaluation of such discounts, the discounts should be considered in determining the low bidder.

It is well established that an award must be made in accordance with the terms of the solicitation. Beacon Winch Company, B-204787, October 9, 1981, 81-2 CPE 299. Therefore, we find no merit in HLJ Management Group's position that the Army now should reevaluate bids without considering offered discounts.

If prompt payment discounts are not to be taken into account, the IFB must be canceled and a new IFB issued. The protester does not specifically advocate that course of action. In any event, cancellation is not proper after bid opening unless there is a compelling reason to reject all bids. DAR § 2-404.1. Under the circumstances, given that bid prices have been exposed, we do not believe the contracting officer's receipt of the Circular after bid opening requires that the invitation be canceled. Therefore, we find the Army properly considered the prompt payment discounts offered by bidders.

The protests are denied.

for   
Comptroller General  
of the United States